FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-700

FIREMAN'S FUND INSURANCE COMPANY,
Petitioner,

v.

DEKALB COUNTY, GEORGIA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (Granted January 17, 1977)

REPLY BRIEF OF PETITIONER FIREMAN'S FUND INSURANCE COMPANY

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April 21, 1977

TABLE OF CONTENTS

Page

INTRODUCTION 1

REBUTTAL OF SOME OF RESPONDENT'S ERRONEOUS FACTUAL ARGUMENTS 2

REBUTTAL OF SOME OF RESPONDENT'S ARGUMENTS OF LAW 7

I. The Pervasive Federal Regulation Of All Aspects Of Aeronautical Commerce Does Preempt Any Conflicting State Law And Policies 7

II. Respondent's References To The Georgia Constitution Are Irrelevant To This Case 11

III. Petitioner Is Not A Mere Incidental Beneficiary Of The Grant Agreement Safety Covenants 11

CONCLUSION 15

CERTIFICATE OF SERVICE 16

EXHIBIT A—Cross-claim of U.S.A. against DeKalb County 1a

TABLE OF AUTHORITIES

Page

Cases:

Arney v. United States, 479 F.2d 653 (9th Cir. 1973) 12, 13

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) 8

Jones v. The Rath Packing Co., 45 U.S.L.Week, 4323 (1977) 9

Kornblut v. Chevron Oil Co., 389 N.Y.S.2d 232 (N.Y.Sup.Ct. 1976) 13, 14

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 8, 10

Rapp v. Eastern Air Lines, Inc., 264 F.Supp. 673 (E.D.Pa. 1967) 13

Starr v. United States, 393 F.Supp. 1359 (N.D.Tex. 1975) 13

Statutes:

49 U.S.C. § 1701 8

49 U.S.C. § 1714 8

49 U.S.C. § 1716 9

49 U.S.C. § 1718 ..... 8, 9

49 U.S.C. § 1718(3) 12

49 U.S.C. § 1718(4) 12

Ga. Code § 23-1502 11

Miscellaneous:

17 Am.Jr.2d Contracts § 302, p. 725 14

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REPLY BRIEF OF PETITIONER FIREMAN'S FUND INSURANCE COMPANY

INTRODUCTION

Petitioner Fireman's Fund Insurance Company respectfully submits this reply brief in response to the brief recently filed by respondent DeKalb County.

The first portion of this reply brief will be devoted to correcting some of the erroneous factual statements and arguments contained in the respondent's brief, and the remaining portion of this reply brief will be devoted to a discussion of some of respondent's arguments concerning the applicable law.

In the interest of brevity, petitioner will not attempt to reply to all of respondent's factual and legal arguments and citations of authority. Instead, and in lieu of a more detailed reply brief, petitioner relies upon the facts and legal principles outlined in petitioner's previously filed petition for writ of certiorari and brief on the merits as constituting sufficient rebuttal of the arguments of respondent not specifically addressed herein.

REBUTTAL OF SOME OF RESPONDENT'S ERRONEOUS FACTUAL ARGUMENTS

On page 4 of its brief DeKalb County mistakenly says that by virtue of the lower court orders dismissing the complaint as to DeKalb County, it no longer is in any manner a party to this case.

Although the U.S.A. cross-claimed against DeKalb County for indemnity and/or contribution (J.A. 132),[1] DeKalb County *never* filed a motion to dismiss the U.S.A.'s cross-claim, and the courts below have *never* ruled on the specific issue of whether so-called "sovereign immunity" would bar the U.S.A.'s cross-claims against the County for indemnity and/or contribution. DeKalb County did move to dismiss the *petitioner's complaint*, but such motion by its own terms was limited to the claims asserted by petitioner. (J.A. 176.) In fact, the DeKalb County defendants in their motion to dismiss asked only "that the *complaint* be dismissed as to them." (J.A. 178.)

And the June 27, 1974 formal docket entry of the District Court regarding the order granting DeKalb

[1] As the U.S.A.'s cross-claim was not printed in the Joint Appendix, a copy of the cross-claim is attached as Exhibit A to this Brief.

County's motion to dismiss the complaint specifically provides: "U.S.A.'s cross-claims still pending against DeKalb County defendant." (J.A. 133.)

Throughout its brief DeKalb County has repeatedly described the area immediately adjacent to the jet runway as a "sanitary landfill" rather than as an open raw garbage dump. While petitioner does not wish to be guilty of "splitting hairs," there is a distinction between an "open garbage dump" and a "sanitary landfill" under Georgia law. A "sanitary landfill" is an area in which articles such as construction debris are placed, whereas an "open garbage dump" is exactly what it sounds like—a place where raw, untreated kitchen, toilet and household garbage and waste materials are deposited. Georgia law requires that a compacted layer of at least six inches of clean earth be placed daily over all such raw garbage, and that other steps be taken to reduce the menace posed by open, raw garbage dumps. (J.A. 169.)

It is clear from the record in this case that the airport area immediately adjacent to the jet runway was an open raw garbage dump, and that the County's characterization of such area as a "sanitary landfill" is both incorrect and misleading. (See J.A. 157-158, 169-170.) See also the exhibits appearing on pages 11d, 2e, 7e and 13e of petitioner's March 2, 1977 brief on the merits.

Next, and in connection with its recent efforts to disguise the area immediately adjacent to the jet runway as a harmless "sanitary landfill," DeKalb County in its brief has sought to create the illusion that this case really does not involve the issue of sovereign immunity vis-a-vis interstate aeronautical commerce

and proprietary operation of a federally-funded public airport, but, instead, involves only the question of whether sovereign immunity attaches to the County's "governmental" function of operating a "sanitary landfill." This contention permeates the County's entire line of defense.

For example, on page 17 of its reply brief the County stated (without any citation to the Record):

> "The pleadings before this Court alleged that DeKalb County was negligent not in its operation of DeKalb-Peachtree Airport, but in the County's operation of a sanitary landfill in close proximity to the Airport."

And on page 6 of its Brief the County said (again without Record citation): "Clearly, the central issue in this case is the operation of a *sanitary landfill*, which is obviously a local government function, lacking in any federal consequence except in terms of the environment, not involved here." (Emphasis in original.) The County further said that petitioner has presented an "argument that garbage collection and disposal enters a Federal sphere of influence." (Brief, p. 36.)

This is simply not so, and is clearly an effort to shift attention from the subject of Federal regulation of interstate aeronautical commerce and airports to an irrelevant, non-existent issue.

The gist of petitioner's claim against the County is that the County *operated the airport* in a negligent fashion, and allowed and maintained an *airport hazard*, and failed to take any steps at all to alleviate or guard against the *airport bird hazard*, and willfully violated federal statutes, regulations and contracts imposing specific duties on the County *with respect to airports*,

airport operations, and airport hazards. See paragraphs 53, 54, 56, 58, 61, 63 and 64 of the complaint, and paragraph 58A of the amended complaint. (J.A. 161-165, 167-170 and 182-183.)

The "sovereign immunity" issues in this case relate to and involve the County's proprietary activity of operating a federally-funded airport, and not to the garbage collection duties of the County (whatever such duties may be). The "central issue" is clearly the federally-funded airport, and not a "sanitary landfill."

Moreover, the County's proprietary airport activities are not "lacking in any federal consequence," as federal funds, federal contracts, federally-imposed duties and the safety of interstate aeronautical travellers are directly involved here.

Next, apparently in an effort to imply that the airport operation is not in fact a proprietary function, the County says (Brief, p. 6) that the airport operated at a loss in 1971 and 1972. The record reveals, however, that gross receipts from airport operations in 1971 and 1972 (including commercial leases with rental computed at fixed amounts, plus a percentage of the tenants' revenues) totalled $241,875.00 and $267,959.00, respectively. (J.A. 129-130. See also J.A. 170-172 and 185-186.)

Moreover, the fact that the airport operations may have resulted in a net financial loss during one particular time period does not *ipso facto* convert the operation from a proprietary function to a governmental function.

On page 28 of its Brief the County, without reference to statute, regulation, case law or contract provision, says that petitioner can have no breach of contract

rights greater than those possessed by the F.A.A., and that the F.A.A.'s *sole* remedies for breach of the Grant Agreements and related federal statutes and regulations are withholding or termination of federal funds, and possibly an action for specific performance.

There is absolutely no language in the Grant Agreements and related federal statutes and regulations so limiting the F.A.A.'s rights and remedies.

Moreover, if as contended by petitioner the safety covenants in the Grant Agreements are *intended* directly for the benefit and safety of "aeronautical users," then obviously such "aeronautical users" have available to them whatever remedies are appropriate to enforce their third-party beneficiary rights, regardless of the nature of the remedies that may or may not be available to the F.A.A. itself.

At page 35 and elsewhere in its Brief DeKalb County refers to the total dollar volume or *ad damnum* of all claims resulting from the crash, and argues that its liability insurance and other resources are not sufficient to cover such amounts. The County then tries to tie together its "sovereign immunity" argument by saying that in the event of adverse judgments the "State of Georgia" would be compelled to pay such judgments, and that petitioners' claims therefore are not really claims against the County, but are (directly or indirectly) unconsented-to claims against the "State of Georgia" itself.

Yet the County has referred the Court to no constitutional, statutory or judicial authorities that would make the "State" liable for any judgments entered against the County in this case, and, indeed, the "State" would not be so liable.

Furthermore, petitioner's property damage claim herein is for $549,432.00, and the County admittedly has a $1,000,000.00 property damage liability policy providing *ample* coverage for such claim. (J.A. 72 and 240.) Thus, neither the County nor the "State" would be obliged to pay any judgment in favor of petitioner, as such payment would be made by the County's own liability insurer.

Next, even if it be assumed, *arguendo*, that the "State" would be required to pay a judgment entered against the County, such fact would not in and of itself render the County immune from liability, as the arguments petitioner has previously advanced against application of sovereign immunity in this particular case and factual setting apply to the "State" as well as to the County.

Last, the County's argument concerning its *alleged* inability to pay judgments reflects confusion on the part of the County with respect to the totally separate and distinct concepts of "suability" and "collectibility." The question of whether a judgment in favor of petitioner and against the County would be partially or totally collectible or not has no relevancy at all to the question of whether petitioner has the right to maintain this particular suit against the County herein.

REBUTTAL OF SOME OF RESPONDENT'S ARGUMENTS OF LAW

I. The Pervasive Federal Regulation Of All Aspects Of Aeronautical Commerce Does Preempt Any Conflicting State Law And Policies.

In its brief the County has suggested that there is no "federal preemption" in the area of aeronautical

commerce, and that application of "sovereign immunity" to petitioner's claims therefore is not precluded.

Federal regulation of aeronautical commerce extends to and includes practically every aspect of aviation, and fills several volumes of the United States Code and even more volumes of the Code of Federal Regulations. Specifically included in such federal regulation are federally-funded airports such as the one involved here. See 49 U.S.C. §§ 1701, 1714 and 1718.

As noted by Justice Jackson in his concurring opinion in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944):

> "Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.
>
> "Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, and in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government."

More recently, in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973), this Court had occasion

to reaffirm that the pervasive federal regulation of all aspects of aviation and aeronautical commerce of necessity preempts and precludes enforcement of any state and local laws and policies that might thwart the policy and objectives of the federal regulation, *regardless of whether the scheme of federal regulation contains any express provision for such preemption.* See 411 U.S. 625 and 633.

And only last month, in a different context, this Court in *Jones v. The Rath Packing Co.*, 45 U.S.L. Week 4323, 4325 (1977) confirmed that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict." The Court also noted that in determining questions of preemption it was necessary "to consider the relationship between state and federal laws *as they are interpreted and applied*, not merely as they are written." 45 U.S.L. Week 4325. (Emphasis added.)

In the case at bar, the commands of 49 U.S.C. §§ 1716 and 1718 and the Grant Agreement safety covenants are quite explicit—DeKalb County was required to remove, mitigate and prevent "airport hazards," and to operate the airport in a "safe condition" for "aeronautical users," and to prevent "*any* activity thereon which would interfere with its use for airport purposes." The County violated these federally-imposed statutory and contractual duties, and such violation directly and proximately resulted in the type of injuries and damage the federal regulation was designed to prevent.

Any state law and policy—or any interpretation or application of state law and policy—that would prohibit th. County from being held accountable for

breach of its federally-imposed duties can serve only to thwart, hinder and emasculate the expressly-stated safety objectives of federal regulation of aviation and airports. Accordingly, such state law (here present in the form of a local concept of county immunity) cannot be given force and effect.

In this regard, the words of Justice Jackson in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 302 (1944) are not inappropriate:

> "Any authorization of local burdens on our national air commerce will lead to their multiplication in this country."

It is difficult to imagine how the safety objectives of federal regulation of federally-funded airports could be more burdened and thwarted than by subjecting the "rights to sue" of interstate aeronautical travellers at such airports to the vagaries of differing laws of various localities relating to the "immunity" *vel non* of a host of various local entities such as counties, cities, agencies, boards, authorities, etc.

DeKalb County's argument that subjugation of the safety objectives of the federal statutory and contractual covenants at issue here to the vagaries of local "immunity" laws would not hinder or burden the federal policy of airport safety just does not comport with reality. Within the particular factual setting of this case, the preemptive effect of federal airport regulation does—and clearly *should*—preclude enforcement of the local "immunity" law relied upon by the County.

II. Respondent's References To The Georgia Constitution Are Irrelevant To This Case.

In addition to relying upon Georgia Code Section 23-1502 relating to county immunity, respondent has urged that its alleged immunity from suit has a basis in the Georgia Constitution. See pages 9-10 of respondent's brief. In this respect, respondent says that the statutory immunity embodied in Georgia Code Section 23-1502 has been "constitutionalized" by the Georgia General Assembly and the electorate.

The airplane crash in question occurred on February 26, 1973. The constitutional amendment relied upon by DeKalb County was not proposed and approved by the General Assembly until late in 1973, and was not ratified by the electorate and did not become effective until November, 1974.

Petitioner's rights had become vested long before the constitutional amendment relied upon by respondent was proposed, approved and ratified, and the amendment clearly cannot be given retroactive or ex post facto effect. Such amendment therefore has no relevancy at all to the issues involved in this case.

III. Petitioner Is Not A Mere Incidental Beneficiary Of The Grant Agreement Safety Covenants.

Petitioner has no quarrel with respondent's arguments that under both Georgia and Federal law only *intended* third party beneficiaries—as opposed to *incidental* third party beneficiaries—can sue for breach of the Grant Agreement safety covenants here involved. Petitioner disagrees vigorously, however, with respondent's conclusory allegations that the petitioners in

these four cases before the Court are not *intended* beneficiaries.

As discussed in our earlier petition and brief, the safety covenants specifically imposed on the County both by 49 U.S.C. § 1718(3) and (4) and by the Grant Agreements are *ex facie* directly intended for the safety and benefit of airport users, aeronautical travellers, and persons on the ground who may be affected by unsafe airport conditions. Indeed, the very essence of practically all federal regulation of aeronautical commerce is aviation safety.

Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973), involving a different yet not wholly irrelevant aspect of federal regulation of aviation, is apropos here:

> "The Civil Aeronautics Act, the predecessor to the Federal Aviation Act of 1958, was enacted, and regulations promulgated thereunder, to promote civil aviation while assuring maximum safety in the air. Rosenhan v. United States (10 Cir. 1942), 131 F.2d 932, 934, cert. denied, 318 U.S. 790, 63 S.Ct. 993, 87 L.Ed. 1156. The 1958 Act had the same purposes. 1958 U.S. Code Cong. & Adm. News, p. 3741. The purpose of the certification of aircraft under the 1958 Act and regulations was to reduce accidents, and the government may be liable for negligence in improper issuance of a type airworthiness certificate. Rapp v. Eastern Air Lines, Inc. (E.D.Pa. 1967), 264 F.Supp. 673, 676, 680, aff'd sub nom., Scott v. Eastern Air Lines, Inc. (3 Cir. 1968), 399 F.2d 14, cert. denied 393 U.S. 979, 89 S.Ct. 446, 21 L.Ed.2d 439. . . .
>
> "The safety of pilots and others aboard aircraft, as well as persons on the ground, depends upon the airworthiness certification program under the Act. We hold that the appellants, Arney and Baker,

> were within the class intended to be protected by regulations and that the alleged harm suffered was of the kind which the regulations were intended, in general, to prevent. The accident which occurred was exactly the sort of risk that might reasonably be anticipated to flow from violation of the Act and the regulations promulgated thereunder." (Footnotes omitted.)

No rational argument can possibly be advanced that petitioners in the cases at bar are not *direct and intended* beneficiaries of the statutory and contractual covenants at issue. The only *conceivable* beneficiaries of such covenants are persons who occupy the same status or class as petitioners.

The courts have consistently held that persons occupying the same status as petitioners here are the direct and intended beneficiaries of the safety duties imposed by law on the F.A.A. under the various Federal aviation statutes. See, *e.g.*, *Arney v. United States*, 479 F.2d 653, 658 (9th Cir. 1973); *Starr v. United States*, 393 F.Supp. 1359, 1364 (N.D.Tex. 1975); *Rapp v. Eastern Air Lines, Inc.*, 264 F.Supp. 673 (E.D.Pa. 1967).

Thus, as petitioners clearly are the direct and intended beneficiaries of the safety duties imposed on the F.A.A. by federal law, plain logic compels the conclusion that petitioners are likewise the direct and intended beneficiaries of the similar safety covenants imposed on the County by federal law. Accordingly, petitioners are entitled to maintain their breach of contract claim against the County.

In addition to the cases cited above and in our earlier petition and brief with respect to the third-party beneficiary issue, petitioner wishes to bring to the attention of the Court the recent decision in *Kornblut v. Chevron*

Oil Co., 389 N.Y.S.2d 232 (N.Y.Sup.Ct. 1976), in which the Court ruled that members of the traveling public were third-party beneficiaries of certain safety and other covenants in a contract between a governmental entity and a private party, and that plaintiff, as a third-party beneficiary, could bring her wrongful death action on a breach of contract theory. The *Kornblut* court based its decision in part on the principle enunciated in 17 Am.Jur.2d Contracts § 302, p. 725:

> "The courts generally have been more liberal in applying the third-party beneficiary rule to public contracts than to private contracts." 389 N.Y.S.2d 234.

In closing, petitioner wishes to make the following general observations in response to the other arguments and case citations set forth in DeKalb County's brief:

(1) None of the "immunity" cases relied upon by respondent involved proprietary operation of an airport by a county, or federal grant agreements, or a factual situation and framework of federal regulation even remotely similar to those involved here.

(2) Respondent has not cited a single case (Georgia or otherwise) holding that operation of an airport by a county is a governmental function.

(3) Respondent has totally ignored the Georgia decisions holding that operation of an airport by a governmental entity is a proprietary function, one of which decisions flatly holds that respondent's operation of the airport involved here is a proprietary, non-governmental function.

(4) No Georgia court has ever held that a county is entitled to immunity from damage claims arising from the county's ownership and operation of a federally-funded airport.

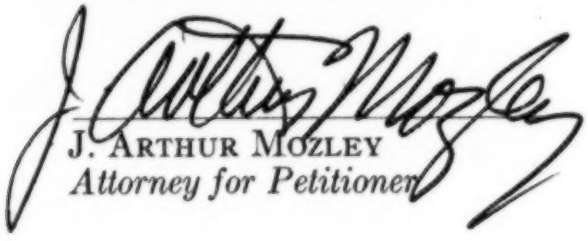
CONCLUSION

If respondent really has total and complete immunity from any and all claims resulting from its proprietary ownership and operation of the airport, why has the respondent each year purchased a large insurance policy providing liability coverage to respondent with respect to airport operations?

The answer is simple. The County has no such immunity from liability, and like any wise businessman, the County secured insurance to protect against its liability.

The decision below should be reversed and petitioner should be allowed a trial of the claims based on negligence, nuisance and breach of federal statutory and contractual safety covenants.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. Arthur Mozley, attorney for Petitioner Fireman's Fund Insurance Company and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of April, 1977, I served three true copies of the foregoing Reply Brief of Petitioner Fireman's Fund Insurance Company upon the respondents and all parties, by depositing in a United States mailbox true copies of said Brief, with first class postage prepaid, correctly addressed to the following, as required by Supreme Court Rule 33:

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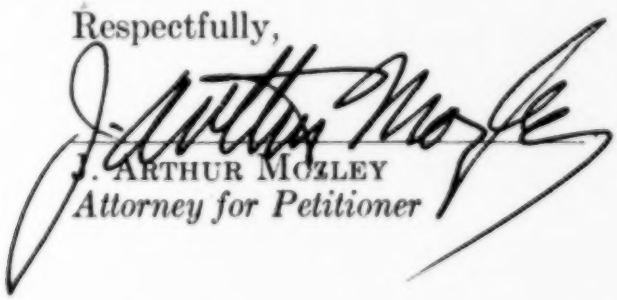
Respectfully,



J. ARTHUR MOZLEY
Attorney for Petitioner

EXHIBIT A

EXHIBIT A

Cross-Claim of U.S.A. Against DeKalb County

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FIREMAN'S FUND INSURANCE COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,
DEKALB COUNTY, GEORGIA
A. C. GUHL
WILLIAM A. WILLIAMS
T. M. CALLAWAY, JR.
HOKE CLAYTON SMITH
ROBERT J. MORRIS
W. M. COOLIDGE
HORIS A. WARD
H. F. MANGET,

Defendants.

CIVIL NO. 7424A

ANSWER, CROSS-CLAIMS, AND COUNTERCLAIM

Now comes defendant, United States of America, by and through its attorneys, and in answer to plaintiff's complaint states and avers as follows:

Response to Count One

1. The United States admits the allegations of paragraphs 6, 26, 27, 45, and 50 of Count One of plaintiff's complaint.

2. The United States denies the allegations of paragraphs 7, 8, 9, 12, 17, 18, 19, 42, 47, 49, 52, 55, 56, 57, 59, 60, and 64 of Count One of plaintiff's complaint.

3. The United States denies the allegations of paragraphs 1, 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), 2(h), 2(i), 2(j), 3(b), 13, 14, 38, 39, and 40 of Count One of plaintiff's complaint for lack of information sufficient to form a belief as to their truth.

4. The allegations of paragraphs 2(a) and 44 of Count One of plaintiff's complaint are conclusions of law which require no answer and are referred to the Court for determination.

5. Responding to the allegations of paragraphs 20, 21, 22, 23, 24, 28, 29, 30, 31, 32, 33, 35, 43, 51, 53, and 61 of Count One of plaintiff's complaint; the United States avers that the statutes (paragraphs 20, 21, 22, 23, and 24), Federal Air Regulations (paragraphs 28 and 29), Advisory Circular (paragraphs 30, 31, and 32), Terminal ATC Manual (paragraph 33), court decision (paragraph 35), Grant Agreements (paragraphs 43, 51, and 53) and the Georgia Code and 1960 DeKalb County Airport Zoning Resolution (paragraph 61) recited therein speak for themselves and that no answer is required.

6. The allegations of paragraphs 54, 58, 62, 63, and 66 of Count One of plaintiff's complaint are directed to DeKalb County; no response is required by this defendant.

7. Responding further to the allegations of paragraphs 61(h) and 63 of Count One of plaintiff's complaint the United States specifically denies the existence of any "bird hazard" or "airport hazard."

8. Responding to the allegations of paragraph 3(a) of Count One of plaintiff's complaint the United States admits it received an administrative claim on May 30, 1973 on behalf of Southeast Machinery, Inc. and Fireman's Fund Insurance Company and that the Federal Aviation Administration denied said claim on January 22, 1974. All other allegations of paragraph 3(a) are conclusions of law which require no answer and are referred to the Court for determination.

9. Paragraph 4 of Count One of plaintiff's complaint is an instruction which requires no answer.

10. Responding to paragraph 5 of Count One of the complaint, this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that Southeast Machinery, Inc. owned the described aircraft. Responding further, this defendant admits on February 26, 1973, at approximately 10:12 a.m. E.S.T., a Learjet Model 24 aircraft, N-454RN, was in the process of taking off from Runway 20L at DeKalb-Peachtree Airport. Responding further, this defendant denies the remainder of the allegations contained in paragraph 5 of Count One of the complaint.

11. The United States admits the allegations of paragraph 10, 15, and 16 of Count One of plaintiff's complaint to the best of our knowledge at this time.

12. Responding to Paragraph 11 of Count One of the Complaint, this defendant admits some dead starlings or other birds were found at or near the departure end of Runway 20L. The United States denies all other allegations of this paragraph.

13. Responding to paragraph 25 of Count One the United States admits it administers air traffic control

of civil air operations within United States airspace; operates F.A.A. air route traffic control centers, airport traffic control towers, flight service stations, and related communication equipment required for control of air traffic; and collects and disseminates information relative to civil aeronautics and safety of flight pursuant to authority from Congress.

14. Responding to the allegations of paragraph 36 of Count One of plaintiff's complaint, the United States admits the first two sentences of this paragraph; the United States denies for lack of information sufficient to form a belief as to its truth the reason the County operates the airport.

15. Responding to the allegations of paragraph 37 of Count One of plaintiff's complaint, the United States admits that F.A.A. air traffic control personnel operated the air traffic control tower at DeKalb-Peachtree Airport on February 26, 1973. All other allegations of paragraph 37 are denied for lack of information sufficient to form a belief as to their truth.

16. Responding to the allegations of paragraph 41 of Count One of plaintiff's complaint the United States denies the first two sentences of this paragraph for lack of information sufficient to form a belief as to their truth. The last two sentences of this paragraph are denied.

17. Responding to the allegations of paragraph 46 of Count One of plaintiff's complaint the United States admits there is an airport layout plan which illustrates "airport facilities," these facilities would not include a garbage dump.

18. Responding to the allegations of paragraph 48 of the cause of action section of plaintiff's complaint,

the United States admits that F.A.A. personnel communicated with DeKalb County regarding birds and the sanitary landfill from March 9, 1970, through February 14, 1972 and that to our knowledge at this time no communication occurred from February 14, 1972 to February 26, 1973. All other allegations of paragraph 48 are denied including the existence of any "bird hazard."

19. Responding to the allegations of paragraph 65 of Count One of plaintiff's complaint, the United States denies the allegations of paragraphs 65(a) and 65(b) for lack of information sufficient to form a belief as to the truth. The allegations of paragraph 65(c) are directed to DeKalb County defendants; no answer is required by this defendant.

20. Responding to the allegations of paragraph 34 of Count One of plaintiff's complaint the United States admits it has had knowledge of bird strike incidents since 1940. Each and every remaining allegation of paragraph 34 is denied. The United States specifically denies the existence of any "bird hazard" at the DeKalb-Peachtree airport. The United States affirmatively avers that 1946 statistics on bird strike incidents are wholly irrelevant to the accident which is the subject matter of this suit.

Response to Counts Two and Three

1. Responding to the allegations of paragraph 1 of Counts Two and Three of plaintiff's complaint, the United States hereby adopts and incorporates by reference its answers to paragraphs 1 through 66 of Count One of plaintiff's complaint as is fully set out herein.

2. The allegations of paragraphs 2 and 3 of Counts Two and Three of plaintiff's complaint are directed to the DeKalb County defendants; no response is required of this defendant.

AFFIRMATIVE DEFENSES

1. Plaintiff's complaint fails to state a cause of action upon which relief can be granted against the United States.

2. Any liability that may exist for plaintiff's death lies in a third party, not the present defendant, United States of America.

3. That the provisions of 28 U.S.C. § 2680(a) are applicable to this defendant.

4. That the provisions of 28 U.S.C. § 2680(h) are applicable to this defendant.

5. The flight of the aircraft was made in connection with, subject to and with acceptance of the known risks and perils of the air through which said aircraft travelled, and acts of God, over which this defendant had no control; and by undertaking said flight, the plaintiff assumed, accepted and undertook all said risks and dangers, of which they had actual or constructive knowledge; and said accident arose out of and resulted from said risks, dangers and acts of God.

6. Defendant, United States of America, denies that any negligent or wrongful act or omission on the part of any agent or representative of the United States caused and/or contributed to the happening of the accident.

7. Employees of plaintiff's insured, Machinery Buyer's Corp. and Southeast Machinery, Inc., were

engaged in a joint venture with others in the use of the aircraft, and any negligence by plaintiff's insured employees contributing to the claimed damages is imputed to plaintiff.

8. That the negligence of the crew of the aircraft caused or contributed to the accident and the damages sued for herein.

CROSS-CLAIMS

Now comes defendant, United States of America, by and through its attorneys and for its cross-claims against co-defendants DeKalb County, Georgia, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Horis A. Ward and H. F. Manget states and avers as follows:

1. Cross claimant hereby adopts by reference all the allegations contained in the complaint filed in this case, without prejudice to the cross claimant's answers and allegations heretofore entered.

2. If the facts alleged in the complaint as to them are true, co-defendants DeKalb County, Georgia, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Horis A. Ward and H. F. Manget are the responsible parties for any damages that plaintiff may have suffered as a result of the accident alleged in the complaint.

3. Cross-defendants DeKalb County, Georgia, A. C. Guhl, William A. Williams, T. M. Callaway, Jr., Hoke Clayton Smith, Robert J. Morris, W. M. Coolidge, Horis A. Ward and H. F. Manget are liable to the cross-

claimant herein for all or part of any amounts that the cross-claimant may be adjudged liable to plaintiffs.

COUNTERCLAIM

Now comes defendant, United States of America, by and through its attorneys and for its counterclaim against plaintiff, states and avers as follows:

1. Counterclaimant hereby adopts by reference paragraphs 7 and 8 of the affirmative defenses herein.

2. That the crash occurred due to the negligence and carelessness of the plane's crew in operating, flying, piloting and controlling said aircraft and in planning said flight.

3. Plaintiff is, therefore, liable to the counterclaimant herein for all or part of any amounts that the counterclaimant may be adjudged liable for arising out of the occurrence that is the subject matter of plaintiff's claim.

Wherefore, defendant, United States of America, demands judgment dismissing the complaint herein, together with its costs and disbursements, and for such other further and different relief which the Court may deem just and proper.

JOHN W. STOKES, JR.
United States Attorney

WILLIAM D. MALLARD, JR.
Assistant U. S. Attorney

/s/GEORGE M. FLEMING

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer, Cross-Claims, and Counterclaim was mailed this 1st day of April, 1974, to:

J. Arthur Mozley, Esquire
Smith, Cohen, Ringel, Kohler,
Martin & Lowe
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Atlanta, Georgia 30303

Meade Burns, Esquire
Long, Weinberg, Ansley & Wheeler
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Decatur, Georgia 30030

/s/ George M. Fleming
George M. Fleming